

**WRITTEN TESTIMONY OF SHAWN REGAN  
RESEARCH FELLOW  
PROPERTY AND ENVIRONMENT RESEARCH CENTER (PERC)<sup>1</sup>**

**BEFORE THE**

**U.S. HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT**

Hearing on “Tribal Energy Resources: Reducing Barriers to Opportunity”

July 17, 2018

**1. Introduction**

Native American reservations have been referred to as “islands of poverty in a sea of wealth.”<sup>2</sup> Per capita income for American Indians living on reservations is about half that of other United States citizens. Thirty-nine percent of Indians live in poverty, compared with 9 percent of white Americans, and Indian unemployment rates are almost four times higher than the U.S. average.<sup>3</sup>

These low incomes persist despite the fact that many Indian reservations contain considerable natural resource wealth, including energy resources. Reservations contain almost 30 percent of the nation’s coal reserves west of the Mississippi, 50 percent of potential uranium reserves, and 20 percent of known oil and gas reserves.<sup>4</sup> The Department of the Interior has estimated that 15 million acres of potential energy and mineral resources are undeveloped on Indian lands, while only 2.1 acres are being tapped for their energy resources.<sup>5</sup> According to one study, the Crow Reservation in south-central Montana contains coal and other assets valued at nearly \$27 billion, or approximately \$3.3 million per person, making the tribe one of the largest coal owners in the world.<sup>6</sup> Yet despite such energy wealth, the tribe’s annual rate of return on coal assets is a mere 0.01 percent, and the tribe has reported unemployment rates as high as 78 percent. Similarly, the

---

<sup>1</sup> PERC is a nonprofit research institute dedicated to improving environmental quality through markets and property rights. PERC pioneered the approach known as free market environmentalism. PERC’s staff and associated scholars conduct original research that applies market principles to resolving environmental problems. Learn more at [www.perc.org](http://www.perc.org).

<sup>2</sup> See Terry L. Anderson, Bryan Leonard, Dominic P. Parker, and Shawn Regan. *Unlocking the Wealth of Indian Nations*, edited by Terry L. Anderson, 2016. Lexington Press. 34.

<sup>3</sup> Grogan, Maura. 2011. *Native American Lands and Natural Resource Development*. Revenue Watch Institute: 6.

<sup>4</sup> Ibid.

<sup>5</sup> Middleton, Robert W. 2008. Hearing before the Committee on Indian Affairs, US Senate. *Indian Energy Development*: Statement of Dr. Robert W. Middleton, 110<sup>th</sup> Congress, Second Session, May 1. Available at: <http://www.indian.senate.gov/public/ files/May12008.pdf>.

<sup>6</sup> Cornell, Stephen, and Joseph Kalt. 2000. Where’s the Glue? Institutional and Cultural Foundations of American Indian Economic Development. *Journal of Socio-Economics* 29(5): 443-70.

Fort Berthold reservation in North Dakota sits atop one of the nation's largest oil and gas plays, but the development of resources on the reservation is slower than off the reservation.<sup>7</sup>

Simply put, energy resources on Indian lands are substantial, and the potential wealth that could be derived from such resources presents a significant economic opportunity for tribal communities, if tribes and individual Indians choose to capitalize on it. Yet, in practice, tribes and individual Indians have encountered barriers that often prevent them from developing or fully capitalizing on their energy resources.

The complex history of federal-Indian relations, as well as the resulting federal trusteeship of Indian affairs, has contributed to these difficulties. Today, crossing a reservation boundary often means entering an entirely different set of legal and property institutions. Inside reservations, legal jurisdictions and land tenure can vary widely, resulting in a complicated mosaic of property ownership, consisting of lands held in trust by the U.S. government on behalf of tribes (tribal trust land), lands held in trust by the federal government on behalf of individual Indians (individual or allotted trust land), and fee-simple lands located within reservation boundaries. Navigating this complex system of land ownership makes both energy development and economic growth difficult on many reservations. Moreover, the federal government's trust authority over Indian lands has often prevented tribes from fully capitalizing on their natural resource wealth when they choose to do so.

The consequences are that even tribes with significant energy resources remain locked in a poverty trap. Their resources amount to "dead capital" that is unable to generate benefits for tribal communities or the broader economy. Policy reforms that enable tribes to more easily convert their resources into "live capital" are sorely needed.

Energy development is just one of many strategies tribes may pursue to generate economic development. But its challenges are similar to the development challenges experienced throughout Indian Country. My written testimony will explore why tribes are often unable to control their own resources and provide insights into how tribes can unleash the tremendous wealth of Indian nations.<sup>8</sup>

## **2. Poverty persists on Native American reservations even though many reservations contain valuable natural resources.**

Indian poverty persists despite the fact that many Native American reservations contain considerable energy wealth. The Department of the Interior recently estimated that Indian lands have the potential to produce 5.35 billion barrels of oil, 37.7 trillion cubic feet of natural gas, and 53 billion tons of coal. According to another estimate, Indian energy resources amount to 30

---

<sup>7</sup> Crane-Murdoch, Sierra. 2012. The Other Bakken Boom: A Tribe Atop the Nation's Biggest Oil Play. *PERC Case Study*. Available at: <http://perc.org/articles/other-bakken-boom>.

<sup>8</sup> For more detailed discussions, see Shawn E. Regan and Terry L. Anderson, "The Energy Wealth of Indian Nations," *LSU Journal of Energy Law and Resources*, 2014, Vol 3, Issue 1. 195-223; and Shawn Regan, "Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development," 2014, *PERC Policy Perspective*. Property and Environment Research Center. Available at: <https://www.perc.org/2014/02/18/unlocking-the-wealth-of-indian-nations-overcoming-obstacles-to-tribal-energy-development/>.

percent of the nation's coal reserves west of the Mississippi, 50 percent of potential uranium reserves, and 20 percent of known oil and gas reserves.<sup>9</sup>

These resources can provide substantial economic opportunities for Native Americans if they choose to pursue energy development. In 2009, the Council of Energy Resource Tribes estimated that, at existing prices, the value of energy resources on Indian lands amounted to nearly \$1.5 trillion.<sup>10</sup> Recent technological advancements in hydraulic fracturing have only increased this potential value.

For many tribes, energy development is the primary revenue generator to fund education, infrastructure, and other public services on tribal land. Some also view energy development as a path to promoting tribal self-determination. Revenue from coal development on the Crow reservation in Montana, for instance, enables the tribe to control more of its own affairs apart from the federal government's trusteeship of Indian lands.

### **3. Most tribal lands with energy resources remain undeveloped.**

Indian lands contain tremendous resource wealth, but the vast majority of tribal lands with energy resources remain undeveloped. The Department of the Interior estimates that energy development is taking place on only 2.1 million acres of Indian lands while an additional 15 million acres with energy potential remain untapped. In other words, 88 percent of Indian lands with energy potential have yet to be developed.<sup>11</sup>

The Fort Berthold reservation, for instance, is located at the center of the shale oil boom in North Dakota. Since 2010, hundreds of wells have been drilled on Fort Berthold, generating more than \$40 million per month for the affiliated tribes in 2013. Just outside the reservation, however, roughly twice as many wells have been drilled per square mile. Lease payments to mineral owners are also higher off the reservation compared to tribal lands, leading many tribal members to question why they are not able to take full advantage of the energy boom occurring around them.<sup>12</sup>

### **4. Federal control makes it difficult for tribes to capitalize on their energy wealth.**

Nearly every aspect of Indian energy development is controlled at some level by the federal government. The Secretary of the Interior must review and authorize all leases and agreements. Federal agencies also collect royalty payments on behalf of tribes and individual Indians and then redistribute them as royalty disbursements to Indian mineral owners.

---

<sup>9</sup> Grogan, Maura. 2011. *Native American Lands and Natural Resource Development*. Revenue Watch Institute.

<sup>10</sup> Prepared statement by Marcus Levings (of Ft. Berthold Tribe) in Hearing before the Committee on Indian Affairs, US Senate, October 22, 2009.

<sup>11</sup> Middleton, Robert W. 2008. Hearing before the Committee on Indian Affairs, US Senate. *Indian Energy Development*: Statement of Dr. Robert W. Middleton, 110<sup>th</sup> Congress, Second Session, May 1. [http://www.indian.senate.gov/public\\_files/May12008.pdf](http://www.indian.senate.gov/public_files/May12008.pdf).

<sup>12</sup> Crane-Murdoch, Sierra. 2012. The Other Bakken Boom: A Tribe Atop the Nation's Biggest Oil Play. *PERC Case Study*. Available at <http://perc.org/articles/other-bakken-boom>.

The government's authority over Indian lands traces its roots to the federal trusteeship established in the early nineteenth century. In 1831, Chief Justice John Marshall described tribes as "nations within a nation," unable to negotiate treaties with foreign nations but implying that they retained the power to govern themselves. Marshall, however, went on to describe the relationship between tribes and the United States as "that of a ward to his guardian." From this conception, the federal government became the trustee of Indian lands. The government holds the legal title to all Indian lands and is required to manage those lands for the benefit of all Indians.

Underlying the federal trust responsibility is the notion that tribes are incapable of managing their own lands. For much of the twentieth century, tribes had little or no control over their energy resources. Royalties and other payments were historically set by the Bureau of Indian Affairs. The agency consistently undervalued Indian resources and, by all accounts, did a poor job of negotiating and collecting royalty payments.<sup>13</sup> In 1977, the Indian Policy Review Commission concluded that "the leases negotiated on behalf of Indians are among the poorest agreements ever made."<sup>14</sup>

In practice, the federal trusteeship of Indian lands limits opportunities for tribal resource development and self-determination. Although tribes have gradually been granted more control over energy development decisions on their reservations, tribes still must acquire approval for every lease, a process that is notoriously slow and cumbersome. Many investors and energy companies simply avoid Indian lands altogether. In addition, Indians themselves are often skeptical of energy development due to past abuses and mismanagement by the government.

## **5. Federal regulations and complex bureaucracies raise the cost of energy development on Indian lands.**

On Indian lands, companies must go through at least four federal agencies and 49 steps to acquire a permit for energy development, compared to as few as four steps off reservations. The effect of this complicated bureaucracy is to raise the cost of entering into resource development agreements with tribes or individual Indians.<sup>15</sup>

The number of agencies and regulations involved in Indian energy development results in confusion, overlap, and a lack of coordination between agencies. The Bureau of Indian Affairs (BIA) has the primary authority over the management of Indian trust assets, but other agencies are involved in related issues such as revenue flows and oversight of resource extraction. These include the Bureau of Land Management, the Office of Natural Resources Revenue, the Office of the Special Trustee for American Indians, and if coal is involved, the Office of Surface Mining Reclamation and Enforcement.

---

<sup>13</sup> Ambler, Marjane. 1990. *Breaking the Iron Bonds: Indian Control of Energy Development*. University Press of Kansas.

<sup>14</sup> Miller, Robert J. 2012. *Reservation "Capitalism": Economic Development in Indian Country*. Bison Books.

<sup>15</sup> Crane-Murdoch, Sierra. 2012. The Other Bakken Boom: A Tribe Atop the Nation's Biggest Oil Play. *PERC Case Study*. Available at <http://perc.org/articles/other-bakken-boom>.

It is not uncommon for several years to pass before the necessary approvals are acquired to begin energy development on Indian lands—a process that takes only a few months on private lands. At any time, a federal agency may demand more information or shut down development activity. Simply completing title search requests results in delays from the BIA. Indians have waited six years to receive title search reports that other Americans can get in a few days.

Tribal energy development projects are subject to a number of federal regulations that do not apply on private lands. For instance, all tribal energy projects must go through National Environmental Policy Act review as well as cultural resource review under the National Historic Preservation Act. Both requirements add to the complexity of energy development on Indian lands, and neither requirement applies to development projects on private lands.

**6. Despite these obstacles, some tribes have succeeded in developing energy resources for the benefit of tribal members and their local community.**

Despite challenges, several tribes have succeeded in developing their resources for the benefit of tribal communities. These tribes have asserted their right to self-determination by taking an active role in resource development.

The Southern Ute Tribe in Colorado, for example, has experienced tremendous success developing its energy resources. The tribe owns and operates five energy companies and invests its energy revenues in a growth fund estimated to be worth \$4 billion. Today, the tribe's 1,400 members are each worth millions and receive dividends every year from the growth fund. The tribe's expertise in energy development extends far beyond the reservation's borders. Red Willow Production Co., a tribal-owned energy company, is engaged in oil, gas, and coal-bed methane extraction throughout the western United States, as well as offshore oil production in the Gulf of Mexico.

The Southern Ute Tribe's success began, perhaps surprisingly, after it declared a moratorium on issuing new energy leases in 1974. The tribal council recognized that the Department of the Interior failed to negotiate appropriate compensation for leases on the reservation. The tribe also lacked the expertise needed to make good decisions about energy development. Following the moratorium, the tribe contracted with outside experts to map and interpret the extent of its undeveloped resources. In the process, the tribe learned the value of their energy resources—and just how undervalued they were by the federal government.

After the tribe lifted the moratorium, it continued to consult with outside experts to guide energy development decisions on the reservation. The tribe contracted with attorneys, auditors, petroleum geologists, and others to take advantage of changes in federal policy that allowed tribes to negotiate their own energy leases. The tribe was also awarded several court settlements for the historic federal mismanagement of tribal assets and used the funds to create Red Willow Energy, its first energy business. By operating its own energy companies, the Southern Ute Tribe established an expertise in resource development and a reputation for good business practices and management.

The tribe's approach to energy development is consistent with its values of self-determination. The tribe conducts its own audits and environmental assessments and operates a land division that is adept at navigating the complex layers of federal agencies that oversee energy projects. Revenues from energy development enable the tribe to pay for government and social services. The tribal-owned energy companies are able to take advantage of their exemption from many of the taxes non-Indian operators must pay. The tribal government has also made efforts to separate politics from business, enabling tribal companies to make their own business decisions.

Other tribes have succeeded in taking control of their natural resources. In the 1990s, the Salish-Kootenai Confederated Tribes on Montana's Flathead Reservation took over more than 100 programs previously run by federal agencies, including forest management. The tribes now earn \$2.04 for every dollar they spend on timber management while the neighboring Lolo National Forest, managed by the federal government, receives only \$1.10 for every dollar it spends.<sup>16</sup> As with other forms of energy development, when tribes are afforded more control over natural resource management, the result has been significantly better management and higher output.

## **7. Tribes are gaining more control over their natural resources, but challenges remain.**

For much of the twentieth century, tribal energy development was almost entirely controlled by the federal government, with little benefit to tribal communities. Today, however, tribes are slowly gaining more control over the management of their natural resources.

In 1982, the Indian Mineral Development Act (IMDA) allowed tribes, but not allottees, to enter into any type of energy extraction agreement they desired. The act also allowed lease terms and royalty amounts to be determined by tribes rather than by federal agencies. Under IMDA agreements, tribes can negotiate leases, joint ventures, production sharing, and other agreements to develop their resources. These agreements are the primary means by which tribes lease lands for energy development today. Nonetheless, the federal trusteeship of Indian lands still requires that the BIA and other federal agencies review every development agreement and lease.<sup>17</sup>

Congress recently attempted to grant tribes even more control over energy development by allowing tribes to create Tribal Energy Resource Agreements (TERAs). Once a TERA is approved on tribal land, the tribe no longer needs to acquire separate approval for each business arrangement it makes in order to undertake resource development. Thus far, however, no tribe has entered into a TERA because, as one report notes, "the rules and regulations around implementing a TERA are exceedingly complex."<sup>18</sup>

Likewise, the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012 removes many of the regulatory hurdles for leasing tribal surface lands. The act enables tribes to create their own leasing regulations and requires the federal government to expedite its approval process. The policy, however, does not apply to "traditional" energy

---

<sup>16</sup> Berry, Allison. 2009. Two Forests Under the Big Sky: Tribal v. Federal Management. *PERC Policy Series* No. 45.

<sup>17</sup> See Government Accountability Office, "INDIAN ENERGY DEVELOPMENT: Poor Management by BIA Has Hindered Energy Development on Indian Lands," 2015. Available at <https://www.gao.gov/products/GAO-15-502>.

<sup>18</sup> Grogan, Maura. 2011. *Native American Lands and Natural Resource Development*. Revenue Watch Institute.

resources such as oil, gas, and minerals, so it offers no help with the obstacles and delays experienced by many tribes.

## **8. Policy reforms could help give tribes more authority over their energy resources.**

Several policy proposals could support tribal sovereignty and address the obstacles imposed by the federal government. These include:

- Give tribes and individual Indians the option to exert broad authority over the use of their land and natural resources. For those wishing to exercise such authority, clarify and grant jurisdiction over all natural resources within reservation boundaries.
- Allow tribes and individual Indians to enter into long-term leases, such as 99-year leases, without BIA approval.
- Make it easier for willing tribes to reduce BIA oversight over natural resource management by developing their own management policies and procedures for tribal property and assets.
- Expand policies aimed at streamlining federal approval of certain tribal affairs, such as the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012. The HEARTH Act currently allows tribes to create their own surface-land leasing regulations for certain limited purposes. Once a tribe's plan is approved by the Secretary of the Interior, the act allows tribes to enter into leases without further approval. The act should be expanded to apply to subsurface energy leasing as well.
- Streamline the approval process for tribes to enter into Tribal Energy Resource Agreements (TERAs), which would give tribes the authority to make energy development plans without requiring BIA approval for each leasing decision. The current TERA process, established in 2008, is so costly and complex that no tribe has yet entered into such an agreement.

## **9. Conclusion**

Tribes have demonstrated time and again that they can succeed when the federal government grants them authority over their natural resources. But much more should be done to give Native Americans the same rights and freedoms that other Americans have to manage their natural resources. This could involve a variety of policy reforms that give tribes more authority to manage their own affairs, govern themselves, and control their land and resources.

Tribes should not have to develop their natural resources if they choose not to. But if they do desire it, the federal government should not make it overly costly or burdensome to do so. It's time to give tribes the dignity they deserve by allowing them to make their own decisions about the land and resources in Indian Country.